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January 27, 2006

RE: Comments on Committee Questions Printed in Federal Register Volume 70, Number 241

Ladies & Gentlemen:

I am writing this letter on behalf of my organization to comment on questions related to the proposed rulemaking by the Committee for Purchase From People Who Are Blind or Severely Disabled ("The Committee") as printed in the Federal Register on December 16, 2005 (Volume 70, Number 241).

My name is Barbara Barnard and since 1987, I have been the President and CEO of ORC Industries, which is an organization of community rehabilitation program (CRP) facilities located in Wisconsin and Texas. I have a Bachelor of Science degree in Psychology and Sociology from the University of Wisconsin and a Masters of Science in Education and Counseling Psychology from the University of Minnesota.

For nearly four decades, ORC Industries has successfully met its mission statement – "To advance the independence, productivity, and self-sufficiency of people with disabilities through employment opportunities" - by providing jobs and social services to this underserved community. Our organization produces military outerwear under government contracts competitively bid under the Javits – Wagner – O'Day ("JWOD") Program. During my tenure, this work has helped bring ORC Industries from the brink of bankruptcy in the mid-1980's back to success and a position of strength to aggressively pursue our mission and expand opportunities and services for our workers.

Currently, ORC Industries employs nearly 800 people at our six plants and we are actively seeking additional work to increase that number and to provide more opportunities for the disabled.

In response to the questions posed by the Committee, ORC Industries offers the following comments for the Committee's consideration:

Questions On Qualified Agencies and Good Governance Practices:

After reviewing the Committee's questions about corporate governance, I am proud to say that ORC Industries, on its own initiative, has already addressed many of the suggested reforms to reinforce our organization and Board's commitment to integrity. ORC Industries has

implemented good governance practices similar to those in the Sarbanes-Oxley Act using an outside expert to adapt these provisions to meet our needs as a nonprofit.

Our all-volunteer Board and the ORC Industries leadership has implemented a vigorous Corporate Compliance Program which is reviewed annually. A Board committee, along with auditors, review our Form 990 filings, audits, and management letter, and reports back to the full Board. One Board Member is a financial accounting expert. In every year of its existence, ORC Industries financial reports have been audited by certified public accountants. Each Board Member and executive officer annually reviews and signs statements on conflicts of interest. Finally, the organization's compensation and pay structure has been reviewed three times in the last five years, most recently by the outside accounting firm of PricewaterhouseCoopers.

Question 4: *"The organization's bylaws should set forth term limits for the service of board members."*

ORC Industries has some concerns regarding mandatory term limits for Board Members. While ORC Industries does have three year term limits, the Board has voted to extend terms as they believe that it is in the best interest of the organization. Members need significant time to develop an appreciation and understanding of ORC Industries' complex dual mission of providing employment opportunities and social service delivery.

Of the eleven current Board Members, seven have been with ORC for between three and forty years. Our longest serving Board Members bring invaluable experience in business and charitable work and to lose them would result in a hardship for the organization.

Moreover, the small size of the communities in which we operate have a limited number of qualified Board members and even fewer individuals who are willing to volunteer their time for Board service.

Other Governance Practices:

Question #1: *"Are these criteria comprehensive and inclusive enough to effectively evaluate that a nonprofit agency demonstrates good governance practices and should be deemed qualified to participate in the JWOD program?"*

The many differences between CRPs in their size, their scope, their executive structures, and their board structures make it difficult to develop such a framework but CRPs can take steps to ensure general compliance to fundamental good governance standards.

The JWOD program has been a tremendous factor in helping provide employment opportunities for disabled workers and ORC Industries' involvement with the program has been a major factor in achieving our mission. Through winning contracts under the program, ORC Industries has been able to offer jobs to hundreds of people with disabilities who would otherwise not have the chance to work, achieve and succeed.

Another key to our success has been ORC Industries' commitment to good governance and integrity. As noted earlier, ORC Industries has chosen to address this issue by implementing good governance practices similar to those in the Sarbanes-Oxley Act. Our organization brought in an outside expert to adapt these provisions to meet our specific unique needs as a nonprofit agency. Moreover, ORC Industries has implemented a vigorous Corporate Compliance Program which is reviewed annually.

Question #2: “Are there additional criteria that should be used, or substituted for the above, to evaluate evidence of good governance practices by nonprofit agencies in the Program?”

In addition to the above mentioned implementation of Sarbanes-Oxley inspired good governance practices, ORC Industries has implemented a vigorous Corporate Compliance Program which is reviewed annually and we believe that other CRPs in the JWOD program could benefit from implementing a similar program. ORC Industries hired an expert attorney from Philadelphia to help us put together this whole program. When implemented and reviewed annually, Corporate Compliance Programs demand that organizations follow many kinds of regulations and gives employees and employers guidelines on operations that can help identify potential problems and fix them proactively. Additional information on Corporate Compliance Programs is attached to this document.

Question #3: “Should accreditation by one or more state or national organizations be recognized as evidence of a nonprofit agency adhering to good governance practices without further review by the Committee?”

From its own experience, ORC Industries believes that these types of accreditations may not be an efficient use of CRP's money for what the accreditation provides. Regarding accreditation for vocational rehabilitation, ORC Industries was certified by CARF for several decades. Approximately 10 years ago, ORC Industries decided to drop the certification procedure because we determined that the program's costs far outweighed the benefits provided by the program and the certification system had become outdated.

For production, ORC has become ISO certified as is required of contractors by the U.S. Government. CRPs are venturing into many different areas such as owning for-profit businesses to provide work for their workers with disabilities. As the public funding has dried up, ORC Industries has become much more dependent upon its production resources, still following its mission, but less involved with accreditation agencies.

Question #5: “Should the size and/or the annual revenue of the nonprofit agency be a factor or factors in assessing appropriate governance practices?”

Size of the CRP and the scope of governance practices should be a consideration for the Committee. As noted earlier, ORC Industries has implemented Sarbanes-Oxley inspired good governance practices. ORC Industries is able to meet these standards as it is a larger, successful organization but many other smaller CRPs could not afford the costs and do not have the personnel to do the same. As noted, accreditation by a national organization is another route however, our organization determined this process to be costly and outdated.

A better and simpler option is to require CRPs involved in JWOD contracting to adopt a complete Corporate Compliance Program written by a professional expert in the field.

Question #6: “What is the best way to ensure that only qualified central nonprofit agencies and nonprofit agencies, with an internal structure that minimizes opportunities for impropriety, participate in the JWOD program?”

NISH needs to do a better job of oversight of CRPs. But first, NISH must gain a greater understanding and better familiarity with a host of issues such as good governance issues, compensation, nonprofit filings, Corporate Compliance Programs, the IRS executive compensation standards, personnel file systems, and the operations of CRPs in general.

The Committee must also understand that the IRS Form 990, completed annually by nonprofit agencies, is an imprecise tool to reflect how much CRPs spend on their employment and social service missions.

While there needs to be a focus upon the business activities of CRPs and other nonprofits, ORC Industries believes that there remains a need to scrutinize the ability of CRPs to offer quality social services/vocational rehabilitation. Presidents and CEOs of CRPs should have a specific educational background in either vocational rehabilitation or social services to ensure that the business side never overtakes the true social services mission.

It is very difficult to find CRP executives who have excellent business skills combined with education and experience in vocational rehabilitation delivery. One concern is that if a CRP has an entire executive staff of “business only” focused people, will the true mission of the CRP – serving the disabled and delivering both jobs and rehabilitation services - be lost? It is a delicate balance to maintain in the marketplace as CRPs have to be more productive and businesslike to be able to continue to operate without public funding and in order to continue operating and growing to offer more jobs to people with disabilities. Social service delivery cannot be lost in this job creation effort.

Question #7: “What if any enforcement mechanisms should be adopted to ensure that only qualified central nonprofit agencies and nonprofits agencies participate in the JWOD Program?”

ORC Industries would recommend establishing standards for nonprofit CRPs participation in the JWOD Program including mandatory legal, nonprofit status and a bona fide 75% or greater number of workers with disabilities. Another check upon CRPs would be confirmation that the CRP is receiving some type of funding from state and/or county governments that view the CRP as a recognized vocational rehabilitation facility.

Questions On Executive Compensation and Fair Market Price Determination:

Question #1: “What is the threshold beyond which the compensation paid to the executives in a JWOD-participating nonprofit agency should be considered as influencing a proposed fair market price determination?”

CRPs have become so diverse in their business scope, their vocational rehabilitation offerings, and the communities they serve, that it is impossible to develop a simplified system of comparing all CRPs to each other.

There are many factors affecting the total available income to run a CRP. Therefore, the compensation paid to executives in a JWOD participating nonprofit agency cannot be solely determined by or for a specific proposed fair market price determination. ORC Industries believes that the 4% commission to NISH is a much larger influence on a proposed fair market price determination than any executive compensation.

A way to address this issue could be through the implementation of a diminishing 4% commission structure for NISH. I previously presented a proposal outlining such a plan to help the pricing of products. The first year or a given number of pieces of the product made would be at 4% commission with the percentage decreasing by 1% each year. Within four years, the NISH percentage would be zero, resulting in significant savings for the U.S. government. Looking at the reserves that NISH has and looking at the large system that they have built leads observers to conclude that NISH’s 4% commission is too much.

Question #2: “Conversely, is there a point below which executive compensation, regardless of the dollar amount paid, would not be considered as influencing a recommended fair market price? Is such a de minimis test appropriate for large diversified nonprofits where total JWOD sales represent only a small percentage of total revenue?”

If the CRP has JWOD sales that represent a small percentage of their total revenue, the JWOD program has absolutely no reason to even consider the CRP’s executive compensation.

Question #3: “Without regard to any analysis of JWOD-related revenue, is there an established benchmark or absolute dollar threshold above which compensation would be deemed as influencing a proposed fair market price?”

The IRS has already established standards on a nonprofit executive’s compensation and any CRP and their Board of Directors can meet these benchmarks by hiring an independent outside expert in executive compensation. When ORC Industries’ Board acted to review its executive compensation structure, we hired the outside auditing firm PricewaterhouseCoopers. These experts reviewed all of the IRS standards and compared executive compensation for ORC Industries to other CRPs as well as other similarly sized companies in the for-profit arena.

Question #4: “Should receipt of documentation to support a “rebuttable presumption of reasonableness” serve to demonstrate that executive compensation does not by itself influence a proposed fair market price or any adjustment thereto?”

Yes. If a compensation structure is permitted under the current IRS rules, has been reviewed for appropriateness by an outside examiner, accepted by the independent Board of Directors and fully disclosed in yearly Form 990 filings, we believe the government should not place additional limits that are over and above these standards.

Question #5: “To what extent should there be a relationship between the pay and compensation of line workers and highly compensated individuals?”

The attempt to link the pay of line workers to that of executives fails to recognize the fundamental differences between these two jobs. Executives are required to lead their organizations, negotiate contracts, supervise the operations of multi-faceted organizations employing hundreds of people and ensure the long-term viability of the organization. While also working hard at their job, it is clear that line workers do not have the same responsibilities in either scope or scale.

Implementing such a linkage between line worker pay and executive compensation might have negative consequences for disabled workers. It is possible that some CRPs would eliminate the lower paid people, those most in need of the kind of jobs the JWOD legislation was enacted to create, to try to meet some false wage “relationship” that might be set.

One area of concern regarding line worker pay that the Committee might consider is the fact that under Social Security’s guidelines, some disabled workers have been taken out of our organization’s subminimum program because they were making too much money.

Question #7: “What approaches are available to identify and monitor nonprofit agencies executive compensation that would provide such information to the Committee routinely but without placing an undue burden on agencies?”

One approach might include making it mandatory that if a CRP has JWOD gross sales above a given figure then it is necessary that that CRP hire an expert agency to do a complete executive compensation review, and a copy of that review be submitted to the Committee on a regular scheduled basis.

In conclusion, ORC Industries thanks the Committee for offering this opportunity to discuss these issues and hopes that it will again carefully consider the comments made by the CRP community as we work together to create new employment opportunities for people with disabilities.

ORC INDUSTRIES, INC.

By: 

Barbara Barnard
President

Attachment

APPENDIX

Corporate Compliance Programs:

An Overview for Organizations Who Do Business With the Government

There is no federal statute or regulation which requires a company to institute and maintain a corporate compliance program. However, the Government can only award contracts to offerors who are deemed to be both responsive and responsible. The Federal Acquisition Regulations (FAR) address the issue of responsibility extensively at FAR Part 9, Subpart 9.1. FAR 9.103(a) is specific that "Purchases shall be made from, and contracts shall be awarded to, responsible contractors only." FAR 9.103(b) requires the contracting officer to make an affirmative determination of the responsibility of a contractor prior to awarding any contract to that contractor.

There are 7 elements of responsibility which must be examined by contracting officers in making a responsibility determination. Those are:

1. Financial capability
2. Capability of meeting delivery schedules
3. Satisfactory performance record
4. Satisfactory record of integrity
5. Necessary organizational capability
6. Necessary production capability
7. Be otherwise qualified and eligible to receive award.

Item #4 has a direct bearing on the advisability of having and maintaining a Corporate Compliance Program.

The purpose of any corporate compliance program is to assure that the employees of the corporation know and understand the policy of the company to remain in full compliance with all laws and regulations applicable to it and to provide training and guidance to the employees about such laws and regulations and about the standard of behavior expected of them when they are acting on behalf of the company.

Implementation of an effective Corporate Compliance Program can have many benefits for an organization. At the most basic level, once a program is in place and has been distributed to all employees, there can be no doubt what the policies of the corporation are and how they will be enforced. Repeatedly, corporate compliance programs have been responsible for the early detection of undesired activities within companies, have lead to the termination of such activities and, where necessary, the termination of the employment of the persons responsible for such activities. In a worst case scenario, having an effective Corporate Compliance Program may greatly reduce or even eliminate corporate culpability for the illegal actions of certain employees acting without the sanctioned structure of the company. For instance, the magnitude of a fine imposed on a corporation as a result of the illegal actions of its agents may be significantly reduced if a company has in place and maintains and implements a corporate compliance program. Under the former Federal Sentencing Guidelines, the base corporate fines which could

be levied against a corporation for the culpability for the actions of its personnel ranged between \$5,000.00 to \$72,500,000.00. That was for base fines alone. Enhancements could increase those figures. If a company has in place and operational an effective Corporate Compliance Program, the fine levels could be reduced by as much as sixty percent.

The key to having an effective Corporate Compliance Program is to institute it, monitor it, and follow up with all personnel on a regular basis to assure that it is being followed and that employees truly do understand what it is and how it works. Having an ability to have a hotline or other means for an employee to make an anonymous report of unacceptable activities is generally also advisable. Assuring follow-up on every complaint received or notice that any unacceptable behavior may be occurring (such as notice from outside auditors of financial irregularities, or from legal staff concerning improper activities or practices or inconsistent figures in inventory control) is critical. No benefit will be derived by a corporation who institutes a Corporate Compliance Program and then fails to implement it or fails to consistently implement it.

In the corporate environment, often the concept of respondeat superior (the liability of a superior for the actions of his/her subordinates) will apply in the event of wrongdoing by an employee. That liability may be limited when "...when the controlling person [the superior] acted in good faith and did not directly or indirectly induce the act or acts constituting the violation." (See Securities Act of 1934). Obviously, the presence of an effective Corporate Compliance Program can also have the salutary effect of shielding the unknowing superior from personal liability in the event that a subordinate embarks on a path of illicit conduct. Needless to say, the superior must in fact be "unknowing." Turning a blind eye to obvious untoward conduct will not count.

A Corporate Compliance Program should contain all of the pertinent policy statements, employee signature statements, instructions how to report a problem and description of pertinent statutes and regulations including penalties which apply in the event of violation thereof. If an Ethics Committee chaired by the Chief Compliance Officer were to be appointed, the description, mandate and operational structure of the Ethics Committee would be included in the full plan.

Corporate Compliance Programs can only be effective if they receive the serious support of senior management. It is therefore most important that senior management understand fully the nature of any Corporate Compliance Program adopted by the company, the requirements of the Program, the legal impact of the Program, and the ramifications for the company and individuals employed by the company (most particularly senior management who well may be in a "Knew or should have Known" status) in the event of failure to comply with the Program. If senior management is not supportive of the Program, the Program tends to fade away to the point of ineffectiveness and the benefits to be derived from having a Program, as well as the protection which the Program can provide both to the company and to individual employees (perhaps most specifically officers) of the company, will be lost.

In particular, if a company has a real Corporate Compliance Program (that is not simply a paperwork sham Program but an active, operational Program), and if the company diligently pursues implementation of their Program, in the event that an individual within the company is

engaged in illicit and/or unethical conduct and in the event that such conduct is disclosed and in the event that the corporation acts promptly with regard to such conduct, if the corporation itself incurs a liability as a result of the employee's conduct, such liability may be subject to downward enhancement and in some instances if the corporation has been diligent, may in fact cause the corporation to avoid liability altogether. Where a corporation has a valid, active, real Corporate Compliance Program which it diligently pursues and which despite pursuit thereof was violated by the bad actions of one or more employees, if the corporation incurs any liability therefore, the liability may be reduced as a result of the Government's examination of the diligent implementation of the Corporate Compliance Program. Thus implementation of an active Corporate Compliance Program can mean that a company will experience either significantly reduced penalties or avoid liability altogether.

Furthermore, in the event that employee actions may warrant suspension or debarment of the employee, a valid, implemented and maintained Corporate Compliance Program may provide the basis for the suspending or debarring official not to impose sanctions on the company in addition to the offending individual. Again, the ability of the Program to protect the company will depend on the magnitude of the Program and the status of its implementation and enforcement by the company. Several examples exist where active, implemented and maintained Corporate Compliance Programs have saved a company from liability for the improper actions of one or more of its employees.

It is our view that all corporations, and particularly very large corporations where it is impossible to watch every employee all of the time, are well advised to implement a Corporate Compliance Program and undertake the effort that is required to maintain its viability and relevance to corporate activities. A Program should address at a minimum the following issues:

- *1. The Corporate Compliance Program itself and its implementation;
- *2. The operations of the Ethics Committee and the duty to report;
- *3. The criminal conduct sentencing issues;
- *4. Anti-trust implications of improper conduct, including, particularly for sales staff, pricing issues.
- *5. Specific review of Robinson-Patman Act, paying particular attention to pricing issues.
- *6. Gratuity issues both as they affect the ethical guidelines of the company and as they may be violative of the law;
- *7. Environmental concerns.
- *8. Human resource and personnel concerns including, but not limited to, affirmative action, Americans With Disabilities Act issues and perceived or actual harassment issues;
- *9. Personal and Organizational Conflicts of Interest; and
- *10. A brief survey of the various statutes listed in the Corporate Compliance Program.

Most corporations find it is advisable to have the Board of Directors specifically authorize implementation of such a Program. To the extent that the duties of the corporate officers can logically be construed to permit the officers to adopt and implement the Program on their own, obviously that is acceptable. Most corporate officers appreciate having a Board Resolution authorizing them to implement such a Program.

Accordingly, while there is no requirement at law that a business have and maintain a Corporate Compliance Program, the advisability of doing so, particularly for businesses which do business with the Federal Government, is great. There are simply so many pertinent laws and regulations applicable to such business that the Corporate Compliance Program provides a vehicle for educating the workforce about them and about the company's policies of compliance therewith. Furthermore, it provides a means for employees to report to management any matter which they deem to be of concern. In our experience, this aspect alone has been highly beneficial to organizations. When improper actions are reported timely so that management can take appropriate measures, further damage to the company can be avoided. But, equally when employees have a mechanism to report matters which concern them, management becomes aware of such matters more quickly resulting in improved employer-employee relations.